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SOMMAIRE EXÉCUTIF / EXECUTIVE SUMMARY

- This note provides information about the history of the victim surcharge provisions. It also provides a status update on litigation concerning the constitutionality of the victim surcharge provisions enacted by former Bill C-37.
- The Bill, which came into force on October 24, 2013, amended the victim surcharge provisions to double the amount that an offender must pay when sentenced and to ensure that the surcharge is applied in all cases.
- The Bill maintained judicial discretion to impose a higher surcharge where the circumstances warrant and the offender has the ability to pay, and eliminated the waiver option to ensure that the victim surcharge is applied in all cases without exception.
- Courts have sought to minimize the impact of imposing the surcharge on offenders who the court believes do not have the ability to pay. This has been done by imposing extremely low fines (e.g., \$1 fine with a \$0.30 surcharge); providing exceedingly long periods of time to pay the surcharge (some up to 60 years); or declaring the victim surcharge provisions unconstitutional.
- Departmental officials will continue to monitor reported cases involving the victim surcharge provisions and continue to provide support to provincial Crowns and the Public Prosecution Service of Canada in their respective efforts to defend the constitutionality of the victim surcharge provisions.

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s.69(1)(g) re (f)

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MEMORANDUM FOR THE MINISTER

Victim Surcharge Litigation Update

ISSUE

This note provides an update on litigation relating to amendments to the victim surcharge enacted by former Bill C-37, the *Increasing Offenders' Accountability for Victims Act* (S.C. 2013, c.11).

BACKGROUND

The victim surcharge was first enacted in 1989 as the 'victim fine surcharge.' In 2000, the *Criminal Code* was amended to rename it the 'victim surcharge.' These amendments also made the surcharge a fixed amount and mandatory, however, sentencing judges had the discretion to waive the victim surcharge if its payment would cause undue hardship to the offender or their dependents. All victim surcharge monies are collected and used by the province or territory where the crime occurred to help fund services to victims of crime.

Between 2000 and 2011, the federal government engaged in ongoing dialogue with the provinces and territories on how to improve the functioning of the victim surcharge. Specifically, the federal government collaborated with provincial and territorial colleagues through the Federal-Provincial-Territorial Working Group on Victims of Crime to conduct several research projects on the victim surcharge. These consultations and the results of the research projects informed the approach in former Bill C-37; however, provinces and territories were not consulted about the specific reforms proposed in this Bill.

Former Bill C-37, which came into force on October 24, 2013, amended the victim surcharge provisions to double the amount that an offender must pay when sentenced and to ensure that the surcharge is applied in all cases. The Bill doubled the surcharge from 15 to 30 percent of any fine imposed on the offender. Where no fine is imposed, the surcharge is doubled to \$100 for offences punishable by summary conviction and \$200 for offences punishable by indictment. Former Bill C-37 maintained judicial discretion to impose a higher surcharge where the circumstances warrant and the offender has the ability to pay, and eliminated the waiver option to ensure that the victim surcharge is applied in all cases without exception. This amendment addressed the practice under the previous law whereby courts did not always impose the surcharge, even in cases where the offender had the ability to pay. Former Bill C-37 also amended the *Criminal Code* to provide that offenders who are unable to pay the surcharge may be able to participate in a provincial fine option program where one exists. They are available in all provinces and territories except in British Columbia, Ontario, and Newfoundland and Labrador; in these three provinces, there are alternative mechanisms for offenders who are unable to pay fines or surcharge.

In *R. v. Wu* [2003] 3 S.C.R. 530, the Supreme Court of Canada held that the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with means to pay the fine. Paragraph 734.7(1)(b)(ii) of the *Criminal Code* states that a warrant of committal should not be issued for the non-payment of a fine unless the offender has refused to pay the fine without reasonable excuse. In *Wu*, the Supreme Court found that genuine inability to pay is a reasonable excuse and that an offender could not be sentenced. Instead, if the offender does not have the means to pay a fine immediately, the offender should be given reasonable time to pay. Accordingly, an offender cannot be incarcerated due to an inability to pay.

CONSIDERATIONS

Cases at issue

Since former Bill C-37 came into effect, some courts have sought to minimize the impact of imposing the surcharge on offenders who the court believes do not have the ability to pay. This has been done by imposing extremely low fines (e.g., \$1 fine with a \$0.30 surcharge); providing exceedingly long periods of time to pay the surcharge (some up to 60 years); or declaring the victim surcharge provisions unconstitutional based on the absence of judicial discretion to waive the victim surcharge.

s.21(1)(a)

Canadian Victims Bill of Rights

The *Canadian Victims Bill of Rights* came into force on July 23, 2015, and contained one amendment in relation to the surcharge that clarifies how much time a convicted offender could be allowed to pay. The offender needs to pay within a period set by the province or territory in which the surcharge was imposed. In cases where there is no period set by the province or territory, the offender needs to pay within a reasonable time. 'Reasonable time' has been interpreted by courts as a question of fact depending on the circumstances of the case and cannot be decided in the abstract. It allows the judge to take into account the offender's financial and other relevant circumstances in establishing a reasonable timeline for payment.

s.13(1)

s.14

s.13(1)

s.14

CONCLUSION

Departmental officials will continue to monitor reported cases involving the victim surcharge provisions and will continue to provide support to provincial Crowns and the Public Prosecution Service of Canada in their respective efforts to defend the constitutionality of the victim surcharge provisions.

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s.69(1)(g) re (f)

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